

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

LISA STEELE,

Plaintiff,

vs.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

No. 03:09-cv-01176-HU

**FINDINGS & RECOMMENDATION
ON MOTION FOR ATTORNEY FEES
UNDER THE EQUAL ACCESS TO
JUSTICE ACT**

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1 HUBEL, Magistrate Judge

2 The plaintiff Lisa Steele brought this action for judicial
3 review of the Commissioner's decision to deny her disability
4 insurance benefits under Title II of the Social Security Act, 42
5 U.S.C. § 1381 *et seq.*, and Supplemental Security Income under Title
6 XVI of the Act. In Findings and Recommendation entered
7 November 17, 2010, the undersigned recommended that the
8 Commissioner's decision be reversed and the case be remanded for
9 further proceedings. Dkt. #16. Neither party filed objections,
10 and on February 4, 2011, Judge Anna J. Brown accepted my
11 recommendation and remanded the case for further proceedings. Dkt.
12 #18. Judgment was entered the same day. Dkt. #19.

13 The plaintiff now moves for an award of attorney's fees under
14 the Equal Access to Justice Act, 28 U.S.C. § 2412 (EAJA), in the
15 amount of \$5,005.74. After negotiations with the defendant, the
16 parties have stipulated to this amount as a compromise settlement.
17 See Dkt. #20. For the reasons set forth below, I recommend the
18 motion be granted.

19 EAJA requires an award of attorney's fees to a prevailing
20 plaintiff in a Social Security appeal, "unless the court finds that
21 the position of the United States was substantially justified or
22 that special circumstances make an award unjust." 28 U.S.C.
23 § 2412(d). In the present case, based on my previous finding that
24 the Administrative Law Judge erred in his evaluation of the
25 evidence, I conclude that the defendant's position was not
26 substantially justified, and thus an award of EAJA fees is
27 appropriate.

1 Determining that a plaintiff is a "prevailing party" for
2 purposes of an entitlement to EAJA fees is only the first step in
3 considering a motion for EAJA fees. "It remains for the district
4 court to determine what fee is 'reasonable.'" *Hensley v.*
5 *Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d
6 40 (1983). The *Hensley* court observed that "[t]he most useful
7 starting point for determining the amount of a reasonable fee is
8 the number of hours reasonably expended on the litigation
9 multiplied by a reasonable hourly rate," *id.*, which calculation
10 results in a "lodestar." *Webb v. Ada County, Idaho*, 195 F.3d 524,
11 527 (9th Cir. 1999) (citing *McGrath v. County of Nevada*, 67 F.3d
12 248, 252 (9th Cir. 1995)). The lodestar may be adjusted to reflect
13 the results obtained in the case. *Id.* (citing *Schwarz v. Sec'y of*
14 *Health & Human Servs.*, 73 F.3d 895, 901 (9th Cir. 1995)). The
15 district court enjoys "considerable discretion . . . in determining
16 what attorney's fee is reasonable." *Id.*

17 The court first will look at "the number of hours reasonably
18 expended on the litigation." *Hensley, supra*. The time records
19 submitted with the plaintiff's motion indicate that attorney Tim
20 Wilborn expended 13.9 hours in this case (5.2 hours in 2009; 7.0
21 hours in 2010; and 1.7 hours in 2011); and co-counsel Betsy
22 Stephens expended 14.75 hours in the case (all in 2010); for a
23 total of 28.65 hours for both lawyers. Preliminarily, the court
24 notes that an expenditure of 28.65 hours falls within the twenty to
25 forty hour range Judge Michael W. Mosman found to be a "reasonable
26 amount of time to spend on a social security case that does not
27 present particular difficulty." *Harden v. Comm'r*, 497 F. Supp. 2d
28 1214, 1215 (D. Or. 2007) (noting "some consensus among the district

1 courts" on this point; citing cases). Judge Mosman agreed that
2 "[a]bsent unusual circumstances or complexity, . . . this range
3 provides an accurate framework for measuring whether the amount of
4 time counsel spent is reasonable." *Id.*

5 In the present case, the administrative record was 422 pages
6 long. The plaintiff's opening brief was 20 pages long and raised
7 six issues, at least one of which was somewhat unique (i.e.,
8 determination of eligibility for DI benefits when a claimant has a
9 felony conviction). In addition, the plaintiff attached 12 pages
10 of the administrative record that had been omitted by the Agency.
11 After review of the Commissioner's 20-page brief, the plaintiff
12 filed an eight-page reply. The attorneys' time records indicate
13 the time expended by counsel in this case was reasonable. None of
14 the entries represent clerical or secretarial tasks not payable
15 under EAJA. See, e.g., *Gough v. Apfel*, 133 F. Supp. 2d 878, 881
16 (W.D. Va. 2001) (noting that "[p]urely clerical activities,
17 regardless of who performs them, are considered overhead and are
18 not compensable as EAJA attorney fees"). In addition, counsel's
19 work did not overlap and they have not billed for duplicate time
20 spent on the same tasks. Although both co-counsel worked on the
21 plaintiff's opening and reply briefs, the total time spent
22 preparing the briefs was reasonable and appropriate (i.e., a total
23 of 14 hours on the opening brief, and a total of 5.7 hours on the
24 reply brief). I therefore conclude that the total attorney time of
25 28.65 hours is reasonable under the circumstances.

1 In considering the applicable hourly rate, the statute itself
 2 sets a \$125 per hour ceiling¹ "unless the court determines that an
 3 increase in the cost of living . . . justifies a higher fee." 28
 4 U.S.C. § 2412(d)(2)(A). To adjust for the cost of living, the
 5 Ninth Circuit applies the national Consumer Price Index for All
 6 Urban Consumers (the "CPI-U"), not seasonally adjusted, and
 7 applying the "all items" index. *Jones v. Espy*, 10 F.3d 690, 692-93
 8 (9th Cir. 1993). The cost-of-living increase is "calculated by
 9 multiplying the \$125 statutory maximum hourly rate by the . . .
 10 CPI-U for the years in which the attorney's work was performed and
 11 dividing by the CPI-U figure for March 1996 (155.7), the effective
 12 date of the statutory maximum hourly rate." *Nadarajah v. Holder*,
 13 569 F.3d 906, 918 (9th Cir. 2009) (citing *Thangaraja v. Gonzales*,
 14 428 F.3d 870, 876-77 (9th Cir. 2005)).

15 The EAJA-adjusted hourly rate for 2009 is \$172.24²; for 2010
 16 is \$175.06³; and for 2011 is \$179.41⁴. Multiplying counsels' hours
 17 for the respective years results in attorney fees of \$895.65 for
 18 2009 (5.2 hours x \$172.24); \$3,807.56 for 2010 (21.75 hours x
 19 \$175.06); and \$305.00 for 2011 (1.7 x \$179.41); for a total of
 20 \$5,008.21 for all three years. This amount is slightly more than
 21 the \$5,005.74 to which the parties have stipulated. See Dkt. #21.
 22

23 ¹Congress raised the rate for EAJA fees from \$75 to \$125 per
 24 hour in 1996. The CPI-U index, all items, not seasonally adjusted
 25 for 1996, was 155.7.

26 ²\$125 x (2009 annual index of 214.537/155.7) = \$172.24.

27 ³\$125 x (2010 annual index of 218.056/155.7) = \$175.06.

28 ⁴\$125 x (2011 index for March, the most recently-available
 month, of 223.467/155.7) = \$179.41.

1 Accordingly, I recommend that the plaintiff's motion for EAJA
2 fees in the amount of \$5,005.74 (Dkt. #20) be granted, and the
3 plaintiff be awarded attorneys' fees in that amount.

4
5 **SCHEDULING ORDER**

6 These Findings and Recommendation will be referred to a
7 district judge. Objections, if any, are due **July 19, 2011**. If no
8 objections are filed, then the Findings and Recommendation will go
9 under advisement on that date. If objections are filed, then a
10 response is due by **August 5, 2011**. When the response is due or
11 filed, whichever date is earlier, the Findings and Recommendation
12 will go under advisement.

13 IT IS SO ORDERED.

14 Dated this 1st day of July, 2011.

15 /s/ Dennis J. Hubel

16 _____
17 Dennis James Hubel
 Unites States Magistrate Judge